

STATE OF MICHIGAN
COURT OF APPEALS

DOUGLAS J. POLLARD and JOANNE L.
POLLARD,

UNPUBLISHED
August 15, 2013

Plaintiffs/Appellees/Cross-
Appellants,

v

No. 311226
Montcalm Circuit Court
LC No. 2011-014613-CH

EARL E. WOOD,

Defendant/Appellant/Cross-
Appellee,

and

COUNTY OF MONTCALM,

Defendant/Cross-Appellee,

and

ANTHONY SANDERS, KATHLEEN
SANDERS, JOHN M. DENSLOW, NANCY M.
DENSLOW, and KELLY DONALDSON,
Personal Representative for the Estate of DONNA
JEAN WOOD a/k/a DONNA WOOD,

Defendants.

Before: WHITBECK, P.J., and OWENS and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals by right from the trial court's June 15, 2012 order that granted plaintiffs title to a 0.22-acre parcel of real property ("the disputed property"). In addition, plaintiffs cross-appeal by right from the trial court's December 12, 2011 order that granted summary disposition in favor of defendant Montcalm County. For the reasons discussed below, we affirm both orders.

I. FACTUAL BACKGROUND

In 1903, Nelts Peterson purchased a parcel of approximately 40 acres on Nevins Lake in Sidney Township, Montcalm County. On June 12, 1908, Peterson conveyed approximately 16 acres (the north parcel) to Peter Hemmingsen. Title to the north parcel was conveyed numerous times throughout the years, until defendant received title from U.S. Bank National Association on November 5, 2007. On March 26, 1919, Peterson conveyed the remaining portion of the original parcel (the south parcel), approximately 24 acres, to Roy Bentley. Title to the south parcel was conveyed numerous times until plaintiffs received title from the estate of Donna Wood.¹

As the trial court noted, the disputed property was “created” in 1961. In 1949, William and Mary Simmons purchased a portion of the south parcel from John Smith that included the disputed property. However, when the Simmonses conveyed their property to Willard and Gladys Lammey in 1961, the disputed property was absent from the property description. The disputed property remained absent from the property description in subsequent conveyances up to and including plaintiffs’ deed. On November 12, 2010, plaintiffs purchased the disputed property by quitclaim deed from William J. Simmons, the sole heir of William and Mary Simmons, the last recorded title holders of the disputed property. The deed was recorded on November 15, 2010.

In 2009, Montcalm County embarked on a sewage-disposal-system project. As part of the project, the county was required to obtain easements over any private properties that the new sewer line would cross. On September 24, 2009, the county obtained an easement from plaintiffs over their property as it was then recorded, i.e., it did not include the disputed property. The easement was recorded on October 30, 2009.

On September 4, 2010, the county obtained a similar easement from defendant, recorded on October 7, 2010. The county admits that, after the recording of both easements, an attorney representing plaintiffs contacted it on November 8, 2010, and alleged that the property description in defendant’s easement crossed over a portion of plaintiffs’ property. In response, the county moved the location of the proposed sewer line so it would not cross the portion of the disputed property directly north of the south parcel. The county obtained an amended easement from defendant that avoided plaintiffs’ property and the portion of the disputed property directly north of plaintiffs’ recorded property, the south parcel. The easement, dated April 22, 2011, was recorded on April 24, 2011.

On September 29, 2009, defendant sued “Nelts P. Peterson, his heirs, devisees and assignees,” requesting that the trial court award him title to the disputed property. Defendant claimed that, “[n]o individual currently enjoys possession of the Parcel in Question.”

¹ No relation to defendant Earl Wood.

Defendant claimed that he “could not locate [Peterson] nor his heirs nor devisees,” and requested the court’s permission to serve by advertisement. On October 19, 2009, the court granted defendant’s request and notice was published on October 31, November 7, and November 14, 2009. After failing to receive any answers to the publication, defendant moved for a default judgment, which the trial court granted on February 8, 2010. The judgment was recorded on February 17, 2010. On February 24, 2010, defendant conveyed the disputed property to himself via quitclaim deed and recorded the deed, joining the disputed property with the north parcel.

On April 14, 2011, plaintiffs filed a lawsuit against defendant, the county, and several other defendants,² requesting the trial court quiet title to the disputed property in their favor. They also requested that the trial court enter an injunction against the county, to prevent it from running a portion of a sewer line through the disputed property. Plaintiffs subsequently amended their complaint to include two claims against the county for trespass and one for unlawful taking and inverse condemnation. Plaintiffs also added a claim of trespass against defendant.

Defendant, plaintiffs, and the county all moved for summary disposition. After hearing oral arguments, the trial court ultimately granted summary disposition in favor of plaintiffs against defendant, and in favor of the county against plaintiffs. Regarding defendant, the trial court concluded that his previous action that resulted in the default judgment was deficient in several respects, and accordingly, it bound neither the trial court nor the parties. Regarding the county, the trial court ruled that it was a good-faith purchaser of the easement from defendant, and that plaintiffs’ other claims were barred by governmental immunity.

II. STANDARDS OF REVIEW

We review de novo a trial court’s resolution of an equitable action and its underlying legal conclusions. *Mason v Menominee*, 282 Mich App 525, 527; 766 NW2d 888 (2009). The trial court’s underlying factual findings are reviewed for clear error. *Jonkers v Summit Twp*, 278 Mich App 263, 265; 747 NW2d 901 (2008). A trial court’s granting of summary disposition is also reviewed de novo. *Wilson v King*, 298 Mich App 378, 381; 827 NW2d 203 (2012).

III. ANALYSIS

Defendant first argues that the court and the parties were bound by the previous default judgment that quieted title in his favor, and thus, the doctrine of res judicata barred plaintiffs from relitigation of the ownership of the disputed property. “The applicability of the doctrine of res judicata is a question of law that is [] reviewed de novo.” *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). We have summarized the doctrine as res judicata as follows:

In general, res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action is identical to that essential to a

² The other defendants are not parties to this appeal.

prior action. The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. Res judicata requires that (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies. The burden of establishing the applicability of res judicata is on the party asserting the doctrine. [*Richards v Tibaldi*, 272 Mich App 522, 530-531; 726 NW2d 770 (2006) (citations omitted).]

Here, there is no dispute that the default judgment entered against Nelts P. Peterson, his heirs, devisees, and assignees in the previous action constituted a final decision on the merits. “A default judgment is treated the same as a litigated judgment for purposes of res judicata and is considered a decision on the merits.” *Id.* at 531. Thus, the first two elements of res judicata are satisfied. With regard to the third element, the matter contested in this case is whether plaintiffs or defendant own the property and it was not resolved in the first action. Although the trial court quieted title to defendant, plaintiffs were not parties in that case. The issue could have been resolved in the first action had defendant added the plaintiffs as parties. Defendant had notice that plaintiffs had an interest in the land, given that their garage was built on part of the disputed property. Accordingly, defendant could have taken steps to add plaintiffs to the litigation or defendant could have at least added the last title holders of record, William and Mary Simmons.³ Lastly, with regard to the fourth element, since neither plaintiffs nor the Simmonses were parties in the first action, both actions did not involve the same parties or their privies.

Assuming for the sake of argument that plaintiffs could be considered privies of Peterson, the four requirements of res judicata would appear to have been met. However, res judicata analysis in quiet title actions implicates the “controlling principles” of MCR 3.411(H), *Richards*, 272 Mich App at 532, which provides:

Except for title acquired by adverse possession, the judgment determining a claim to title, equitable title, right to possession, or other interests in lands under this rule, determines only the rights and interests of the known and unknown persons who are parties to the action, and of persons claiming through those parties by title accruing after the commencement of the action.

Thus, in order to be bound by the default judgment, plaintiffs must be either “known and unknown persons who are parties to the action” or “persons claiming through those parties by title accruing after the commencement of the action.”

We dealt with a similar issue in *Richards*, where the plaintiff obtained a default judgment against the Keytons and KDC quieting title in his favor. *Richards*, 272 Mich App at 527.

³ Additionally, MCR 2.612(B) provides that, “[a] defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, may enter an appearance within 1 year after final judgment” In this case, over one year had passed between the default judgment and plaintiffs’ instant action.

Subsequently, the plaintiff filed an action against the defendants requesting that the trial court quiet title to the property in his favor. *Id.* The plaintiff in *Richards* argued that the defendants were privies of the Keytons and KDC because the Keytons conveyed the property to KDC who then conveyed it to the defendants. *Id.* at 529. Thus, the plaintiff argued that the doctrine of res judicata barred any claim that defendants had regarding ownership of the property. *Id.* We determined that the “defendants were not ‘parties to the [previous] action’” *Id.* at 533, quoting MCR 3.411(H). Specifically, “that portion of MCR 3.411(H) referring to ‘parties’ does not provide a basis to find the judgment in the previous action binding on defendants. The plain language of MCR 3.411 regarding ‘parties’ does not contemplate persons who *could have* been made or become parties.” *Id.* (emphasis in original).

In this case, the only named defendants in defendant’s quiet title action were “Nelts P. Peterson, *his* heirs, devisees, and assignees.” (Emphasis added). Plaintiffs are not heirs, devisees, or assignees of Peterson. Plaintiffs obtained title to the south parcel from the estate of Donna Wood, and title to the disputed property from William J. Simmons, sole heir of William and Mary Simmons. As stated in *Richards*, MCR 3.411(H) “does not contemplate persons who *could have* made or become parties. Because defendant did not specifically name plaintiffs or the Simmonses as defendants in the previous action, plaintiffs are not considered “parties to the [previous] action,” and as such, are not bound by the default judgment. MCR 3.411(H); *Richards*, 272 Mich App at 533.

Additionally, the fact that plaintiffs purchased the disputed property by quitclaim deed from William J. Simmons after the commencement of defendant’s previous action is irrelevant. MCR 3.411(H) provides that the previous default judgment bound only “known and unknown persons *who are parties to the action*, and [] persons claiming *through those parties* by title accruing after the commencement of the action.” (Emphasis added). Thus, had the Simmonses or their heir been named parties in defendant’s previous action, plaintiffs would be bound by the default judgment, their title having been purchased from William J. Simmons subsequent to the commencement of defendant’s previous action. However, because neither the Simmonses nor their heir were specifically named as parties in the previous action, plaintiffs were not bound by the default judgment. Thus, we conclude that the trial court did not err in ruling that plaintiffs’ claim was not barred by res judicata.

We also agree with the trial court’s conclusion that defendant’s previous action contained several deficiencies. MCR 3.411 provides, in relevant part:

(A) This rule applies to actions to determine interests in land under MCL 600.2932.^[4] It does not apply to summary proceedings to recover possession of premises under MCL 600.5701-600.5759.

⁴ Defendant’s complaint in the previous action did not cite MCL 600.2932 or any other statutory authority. However, the complaint, styled as a “petition to determine and correct title to real property,” clearly arose under MCL 600.2932(1), which provides, in relevant part:

(B) Complaint.

(1) The complaint must describe the land in question with reasonable certainty by stating

(a) the section, township, and range of the premises;

(b) the number of the block and lot of the premises; or

(c) another description of the premises sufficiently clear so that the premises may be identified.

(2) The complaint must allege

(a) the interest the plaintiff claims in the premises;

(b) the interest the defendant claims in the premises; and

(c) the facts establishing the superiority of the plaintiff's claim.

(C) Written Evidence of Title to be Referred to in Pleadings.

(1) Written evidence of title may not be introduced at trial unless it has been sufficiently referred to in the pleadings in accordance with this rule.

(2) The plaintiff must attach to the complaint, and the defendant must attach to the answer, a statement of the title on which the pleader relies, showing from whom the title was obtained and the page and book where it appears of record.

(3) Within a reasonable time after demand for it, a party must furnish to the adverse party a copy of an unrecorded conveyance on which he or she relies or give a satisfactory reason for not doing so.

(4) References to title may be amended or made more specific in accordance with the general rules regarding amendments and motions for more definite statement.

In ruling that neither the parties nor the court were bound by the default judgment, the trial court found several "deficiencies" with defendant's previous action. In particular, the trial court took issue with defendant's assertions in the previous litigation that "no other people

Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.

claimed an interest in the [disputed] property after 1903[.]" especially since exhibits showed that plaintiffs' garage is partially located on the disputed property.

The trial court also found defendant's description of the property inaccurate. Defendant's original petition described Peterson's property as "being forty acres *or more*" Defendant's argument in the previous litigation was that Peterson's original land contained more than 40 acres, and that the resulting split of the property into 24- and 16-acre parcels left the disputed property essentially ownerless. However, Peterson's original deed actually described the property as "being forty acres *more or less*." As the trial court stated, "[t]he only factual basis for saying the property is over 40 acres is the inaccurate and misleading quote in the deed description. There is no survey or other factual basis for this conclusion."

The trial court further noted that defendant failed to allege the interest he claimed in the land, explain how his claim was superior to others, and attach a statement of title, in violation of MCR 3.411. Lastly, the trial court questioned whether defendant had truly been entitled to serve notice by publication. The trial court noted that the last known addresses of owners subsequent to Peterson could likely have been located after diligent inquiry.

The trial court's findings were not erroneous. Defendant's original action was deficient in several respects. First, the petition inaccurately described Peterson's original parcel. The fact that defendant's complaint emphasized that the original parcel was "forty acres *or more*" when in fact the description actually stated "forty acres more or less" is disconcerting, especially since defendant's entire original theory was based on the assertion that the original parcel contained more than 40 acres. Second, defendant failed to assert his interest in the property and how that interest was greater than other possible claimants. This is likely because neither defendant, nor his predecessors in title, have ever had an interest in the disputed property. This is further supported by evidence that indicates that plaintiffs' garage is partially located on the disputed property.

Next, defendant was likely not entitled to service by publication. "Notice by publication is sufficient . . . when, under the circumstances, it is not reasonably possible or practicable to provide more adequate notice." *Wortelboer v Benzie Co*, 212 Mich App 208, 218; 537 NW2d 603 (1995). Reasonable investigation would likely have indicated that the last recorded titleholders of the disputed property were William and Mary Simmons, who obtained their title decades after Peterson originally split the property. At the very least, they should have been named defendants. Further, reasonable investigation likely would have revealed that plaintiffs' garage rests partially on the disputed property and that they would likely contest defendant's claim of title. Again, defendant possessed no colorable claim of title and based his theory on the idea that the disputed property belonged to no one and had never been conveyed by Peterson. Reasonable investigation into recorded deeds would have revealed this theory to be factually incorrect.

Defendant did not assert any claim of adverse possession or acquiescence. Thus, he was required to assert some sort of claim of title to the property. He failed to do so. In fact, the evidence shows that plaintiffs were actually in possession of the disputed property, by virtue of the location of their garage. Because defendant's original action failed to meet the requirements of MCR 3.411 and failed to assert any valid claim of interest in the disputed property, the trial

court did not err in disregarding the default judgment and ruling that the parties were not bound by it.

Defendant's final argument, that plaintiffs have never demonstrated a legitimate title interest in the disputed property, is without merit. The last recorded titleholders to the disputed property were William and Mary Simmons. The disputed property was subsequently omitted from future transfers of the south parcel. Thus, the Simmonses still held title to the disputed property. Plaintiffs purchased title to the disputed property from the sole heir of William and Mary Simmons. Accordingly, plaintiffs established a legitimate title interest.

For the aforementioned reasons, we affirm the trial court's grant of summary disposition and award of title to the disputed property in favor of plaintiffs.

On cross-appeal, plaintiffs argue that the trial court erred in granting summary disposition in favor of the county. Much of the county's argument on appeal restates defendant's argument that the default judgment was binding on plaintiffs. As discussed above, this argument fails. However, based on the county's other arguments, we affirm.

The trial court did not err in finding that the county purchased the sewer easement from defendant in good faith. This Court has held that "[a] good-faith purchaser is one who purchases without notice of a defect in the vendor's title." *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992). Our Supreme Court has stated:

When a person has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate, and fails to make them, he is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed. [*Kastle v Clemons*, 330 Mich 28, 31; 46 NW2d 450 (1951).]

At the time the county obtained its easement from defendant, it had no notice, actual or constructive, that plaintiffs had a claim to the disputed property. The county was unaware of any defects in defendant's title. In fact, any defects were presumably remedied by the recorded default judgment that quieted title to the disputed property in defendant. The one-year period to challenge the default judgment had expired. The county relied on the default judgment in obtaining the sewer easement. An honest and reasonable man, or in this case, a government entity, would not make further inquiries into the owner of the disputed property when presented with an unchallenged default judgment that quieted title in defendant. At best, the county had notice from plaintiffs' attorney that they believed themselves to be the owners of the disputed property. However, the fact remains that at the time the county obtained the easement, defendant possessed title to the disputed property via the recorded default judgment. Because the county obtained an easement over the disputed property in good faith, the trial court did not err in granting the county summary disposition on plaintiffs' claims of unlawful taking and injunctive relief.

Any claims by plaintiffs against the county for trespass or nuisance must necessarily fail. Michigan's Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.*, provides that governmental entities, such as Montcalm County, are immune from tort liability while engaged

in government functions, such as installing sewer lines. MCL 691.1407(1). “A governmental agency can be held liable under the GTLA only if a case falls into one of the enumerated statutory exceptions[,]” which must be narrowly construed. *Moraccini v Sterling Heights*, 296 Mich App 387, 392; 822 NW2d 799 (2012). Our Supreme Court has specifically held that no “trespass-nuisance exception” to governmental immunity exists. *Pohutski v Allen Park*, 465 Mich 675, 689-690; 641 NW2d 219 (2002).

In an attempt to avoid governmental immunity, plaintiffs argue that the county was grossly negligent in failing to obtain an easement from plaintiffs before constructing the sewer line across the disputed property. Generally, an employee of a governmental agency is immune from tort liability for damage to property caused by that employee while acting on behalf of the governmental agency if the employee’s “conduct does not amount to gross negligence that is the proximate cause of the injury or damage.” MCL 691.1407(2)(c). The GTLA defines “gross negligence” as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a). “Evidence of ordinary negligence is not enough to establish a material question of fact regarding whether a government employee was grossly negligent.” *Chelsea Investment Group LLC v Chelsea*, 288 Mich App 239, 265; 792 NW2d 781 (2010). Plaintiffs argue that the county’s reliance on the default judgment that quieted title to the disputed property in defendant amounts to gross negligence. As discussed above, the county is protected as a good-faith purchaser of the sewer line easement from defendant. The county’s failure to secure an easement from plaintiffs over the disputed property does not amount to gross negligence. Accordingly, the county is immune from plaintiffs’ claims.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Michael J. Kelly